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In the Supreme Court of the United States

OCTOBER TERM, 1941

RALPH W. CREWS, *Petitioner,*
vs. NO. 548
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

ROBERT E. CREWS, *Petitioner,*
vs. NO. 549
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

AMY TRESNER, *Petitioner,*
vs. NO. 550
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

CHARLES CREWS, *Petitioner,*
vs. NO. 551
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

EVERETT J. CREWS, *Petitioner,*
vs. NO. 552
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

MARY WILLIS, *Petitioner,*
vs. NO. 553
COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

PETITION FOR SIX WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

By ALBERT L. MCRILL,
J. D. LYDICK,
M. F. PRIEBE,
Attorneys for Petitioners,

Dated August 21, 1941.

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PETITION FOR SIX WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

PETITION FOR WRITS OF CERTIORARI

To The Honorable Supreme Court of The United States:

Your petitioners, Ralph W. Crews, Robert E. Crews, Amy Tresner, Charles Crews, Everett J. Crews and Mary

Willis, pray that six separate writs of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Tenth Circuit dismissing petitioners' petitions to review the decisions of the United States Board of Tax Appeals.

STATEMENT

These cases, six in number and all presenting the same questions for determination, were instituted in the Board of Tax Appeals to determine asserted deficiencies in petitioners' income tax, for the calendar year 1930. Five different opinions were promulgated by the Board (30 B. T. A. 615, 31 B. T. A. 187, 33 B. T. A. 36, 33 B. T. A. 441, 37 B. T. A. 387), and three opinions have been written by the Circuit Court of Appeals (89 Fed. (2d) 412, 108 Fed. (2d) 712, 120 Fed. (2d) 749). The petitions to review were consolidated in the Circuit Court of Appeals and submitted upon the basis of one complete transcript of record in case No. 2197, *Ralph W. Crews* v. *Commissioner of Internal Revenue*, and abbreviated records in the remaining cases, and all the cases were briefed, argued and decided together, with only the record in No. 2197 being printed, and the judgment and mandate entered and issued in the one case was made the final judgment and mandate in each of the other cases (R. 4).

The petitioners were engaged as owners in developing an oil and gas property. On the first appeal to the Circuit Court of Appeals the only issue determined was the gross income from the property. See 89 Fed. (2d) 412. Peti-

tioners claimed deduction as a loss the sum of $514,000.00, the value of certain government bonds held in escrow and stolen before the time for actual delivery to petitioners. The Circuit Court held this sum was no part of the gross income from the property and fixed the gross income at $1,213,456.09. On the second appeal the only issue was whether development expenses should be deducted in determining the net income from the property for depletion purposes. The Circuit Court held that they should be so deducted, following this Court's opinions in *Helvering, Commissioner,* v. *Wilshire Oil Company*, 306 U. S. 628, and *F. H. E. Oil Company* v. *Commissioner*, 307 U. S. 618. In this decision the Circuit Court determined only two questions, the proper depletion allowance and the net income from the property. The mandate directed the Board of Tax Appeals to redetermine the tax liabilities in accordance with the Circuit Court's opinion (R. 18, 19).

An item of $173,000.00 expended by petitioners for attorneys' fees in connection with litigation growing out of the operation of their property was not considered by the Circuit Court of Appeals on either of the two appeals, and the Board of Tax Appeals in its decision from which the second appeal to the Circuit Court was prosecuted expressly reserved passing on that question (R. 75). The cases were therefore remanded to the Board with the matter of attorneys' fees still open.

After the filing of the mandate the parties filed their respective recomputations (R. 21 and 25). The Board set the cases for trial and they came on for hearing before the

Board on the 3rd day of April, 1940. The recomputation submitted by the petitioners accepted the gross income from the property, the depletion allowance and the net income from the property as fixed by the Circuit Court of Appeals and then deducted the attorneys' fees, personal exemptions, etc., reflecting that no tax was due and that petitioners were entitled to refunds. The Commissioner in his recomputation accepted the basic figures fixed by the Circuit Court of Appeals, but, as clearly appears from the recomputation, did not give petitioners a deduction for their attorneys' fees. At the hearing two questions were raised: (1) Whether an item of $177,343.70, rejected income, had been added as additional income of the taxpayers, and (2) whether the attorneys' fees of $173,000.00 had been deducted. After argument the case was submitted on the transcript before the Board (R. 32).

On April 18, 1940, the Board made its decision fixing tax liability against each petitioner and assessing a deficiency. Petitioners filed petitions for review July 5, 1940 (R. 97) and gave notice of appeal (R. 98). The Circuit Court of Appeals, on June 3, 1941, handed down its decision dismissing the petitions for review on the ground that the only question presented by the petitions was whether the Board of Tax Appeals had acted in accordance with the mandate of the Circuit Court of Appeals, and that the petitions were therefore not filed in time, under the provisions of Section 1140(c)(2) of the Internal Revenue Code, 26 U. S. C. A., Section 1140.

A complete statement of facts preceding the setting up

of deficiencies by the Commissioners, out of which grew the issues of gross income from the property, depletion allowance, and net income from the property, is set out in the first two decisions of the Circuit Court of Appeals (89 Fed. (2d) 412, and 108 Fed. (2d) 712).

JURISDICTION

1. The jurisdiction of this Court is invoked under paragraph 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. Code, Tit. 28, para. 347).

2. The decision of the Circuit Court of Appeals was entered on June 3, 1941.

QUESTIONS PRESENTED

1. Did the petitions for review seek merely to correct the decisions of the Board of Tax Appeals so that they would accord with the mandate of the Circuit Court of Appeals and thus render applicable Section 1140(c)(2) of the Internal Revenue Code, 26 U. S. C. A., Sec. 1140?

2. Did the Board of Tax Appeals have authority in computing petitioners' tax to make or refuse deductions allowed by law, so long as such deductions did not violate the mandate from the Circuit Court of Appeals?

3. Did the petitioners have a right of appeal under Section 1142, U. S. C. Supp. V, Title 26, Sec. 1142, where they were denied a proper deduction which had not been considered by the Circuit Court of Appeals and was not within the scope of its mandate?

4. Are the petitioners entitled to a deduction of $173,000.00 attorneys' fees as an ordinary business expense?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRITS

The petitioners rely on the following reasons for the allowance of the writs of certiorari:

1. The Circuit Court of Appeals has decided, in a manner contrary to the intent of Congress as expressed in the statute, an important question of federal law, to-wit: the meaning and application of Section 1140(c)(2) of the Internal Revenue Code, 26 U. S. C. A., Sec. 1140, which question has not been, but should be, settled by this Court.

2. The decision of the Circuit Court of Appeals is apparently in conflict with applicable decisions of this Court holding that a taxpayer is entitled to deduct attorneys' fees as an ordinary business expense from net income after depletion.

Kornhauser v. *United States*, 276 U. S. 145.

Helvering v. *Speyer*, 296 U. S. 631.

Helvering v. *F. & R. Lazarus & Co.*, 308 U. S. 252.

Deputy v. *DuPont*, 308 U. S. 488.

CONCLUSION

Wherefore, your petitioners pray that writs of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings

of said Court had in the cases numbered and entitled on its docket, No. 2197, *Ralph W. Crews, Petitioner,* v. *Commissioner of Internal Revenue, Respondent;* No. 2198, *Robert E. Crews, Petitioner,* v. *Commissioner of Internal Revenue, Respondent;* No. 2199, *Amy Tresner, Petitioner,* v. *Commissioner of Internal Revenue, Respondent*; No. 2200, *Charles Crews, Petitioner,* v. *Commissioner of Internal Revenue, Respondent;* No. 2201, *Everett J. Crews, Petitioner,* v. *Commissioner of Internal Revenue, Respondent;* No. 2202, *Mary Willis, Petitioner,* v. *Commissioner of Internal Revenue, Respondent,* to the end that these causes may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment and order of said Court be reversed by this Court, and for such further relief as to this Court may seem proper.

Respectfully submitted,

RALPH W. CREWS, ROBERT E. CREWS, AMY TRESNER, CHARLES CREWS, EVERETT J. CREWS, MARY WILLIS,
Petitioners,

By ALBERT L. MCRILL,
J. D. LYDICK,
M. F. PRIEBE,
Their Attorneys.

Dated August 21, 1941.

BRIEF IN SUPPORT OF PETITION

I.

OPINIONS IN COURT BELOW

These cases orignated in the United States Board of Tax Appeals. From decisions of the Board entered April 18, 1940 (R. 86) adverse to the petitioners they took the cases for review to the Circuit Court of Appeals for the Tenth Circuit. That Court dismissed the petitions for review. No opinion was written by the Board of Tax Appeals, and the opinion of the Court below handed down June 3, 1941, appears at pages 102-106 of the Record, and is reported in 120 Fed. (2d) 749.

II.

STATEMENT OF THE CASES

A statement of the cases containing all that is material to the consideration of the questions presented, with appropriate references to the printed record and decisions, has been made in the petition for the writs and such statement is hereby adopted and made a part of this brief.

III.

STATUTES INVOLVED

Section 1140(c)(2) of the Internal Revenue Code, 26 U. S. C. A., Sec. 1140:

"Section 1140. Date When Board Decision Becomes Final:

"(c) Decision modified or reversed:

"(2) Upon mandate of the Circuit Court of Appeals:

"If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, * * * then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

"Section 1142. Petition for Review:

"The decision of the Board rendered after February 26, 1926 (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Board prior to February 26, 1926), may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered. 53 Stat. 165."

IV.

ASSIGNMENT OF ERRORS

Petitioners make the following assignment of errors committed in the opinion and decision of the Court below:

1. The Circuit Court of Appeals erred in holding that the decision of the Board of Tax Appeals was under petitioners' theory a departure from its mandate.

2. The Circuit Court of Appeals erred in holding that the decision of the Board became final at the expiration of 30 days from the time it was rendered.

3. The Circuit Court of Appeals erred in dismissing petitioners' petitions to review.

4. The Circuit Court of Appeals erred in holding that the $173,000 deduction of attorneys' fees had been allowed and made by the Board.

5. The Circuit Court of Appeals erred in refusing to review the proceedings of the Board and allow the petitioners the deduction of $173,000 attorneys' fees.

V.

ARGUMENT

SYNOPSIS OF ARGUMENT

In support of the errors assigned the petitioners assert and rely on the following propositions which will be presented and considered in order:

1. The appeal to the Circuit Court of Appeals was not

a proceeding to correct the decision of the Board of Tax Appeals because of a departure from the mandate of the Circuit Court of Appeals, but was an appeal to determine the deduction of attorneys' fees as an ordinary business expense, a question not considered by the Circuit Court of Appeals, and did not in any way involve the construction of the mandate of the Appellate Court.

2. The Board of Tax Appeals, under the mandate of the Circuit Court of Appeals, had authority to make such decisions on questions not determined and settled by the Appellate Court as were necessary in order to determine the tax of petitioners.

3. The question of attorneys' fees had been left open and undecided by both the Board and the Circuit Court and was a proper and necessary question to be determined by the Board.

4. The petitioners were not given a deduction in the decision of the Board for the attorneys' fees expended and are entitled to such deduction.

5. The appeal to the Circuit Court of Appeals was governed by Section 1142 of the Internal Revenue Code, not by Section 1140 (c) (2) of such Code, and the Circuit Court of Appeals had jurisdiction.

Proposition One

The appeal to the Circuit Court of Appeals was not a proceeding to correct the decision of the Board of Tax Appeals because of a departure from the mandate of the Circuit Court of Appeals but was an appeal to determine the deduction of attorneys' fees as an ordinary business expense, a question not considered by the Circuit Court of Appeals, and did not in any way involve the construction of the mandate of the Appellate Court.

On the first appeal of these cases the Circuit Court of Appeals determined and settled but one question and that was the petitioners' gross income from the property (89 Fed. (2d) 412). The order of the Appellate Court was that the causes be "reversed and remanded to the Board for further proceedings in accordance with this opinion." The mandate (R. 17) ordered and adjudged "that this cause be and the same is hereby remanded to said United States Board of Tax Appeals for further proceedings in accordance with the opinion of this Court."

Upon the filing of the mandate from this Court the Board, on May 14, 1937, made its order "placing proceedings upon the day calendar of June 9, 1937, for hearing on final disposition in accordance with the views expressed in the opinion of the U. S. Circuit Court of Appeals (10) rendered March 29, 1937, and prior to hearing the parties file recomputations in accordance with such mandate" (R. 13). On June 25, 1937, petitioners filed their computation and a motion to receive further evidence (R. 13). The cases were placed on the day calendar of September 15, 1937, for hearing in accordance with order dated May 14, 1937 (R.

13). On September 28, 1937, the Board granted the taxpayers' motion to introduce further evidence. On November 24, 1937, a hearing was had before the Board and the cases submitted (R. 14). The Board rendered an opinion on February 23, 1938, and its decision was entered April 7, 1938. On June 27, 1938, the Commissioner filed petitions for review (R. 15).

The second opinion of the Circuit Court of Appeals was filed December 11, 1939, and the mandate to the Board of Tax Appeals (R. 18) ordered and adjudged that the Board "redetermine the tax in accordance with the opinion of this Court," and the Board was "commanded that such further proceedings be had in said cause, in conformity with the opinion and judgment of this Court as according to right and justice, and the laws of the United States, ought to be had."

On February 8, 1940, the Board ordered that the proceedings be placed upon the Washington calendar of February 28, 1940, "for final decisions in accordance with the views expressed in the opinion of said Court rendered December 11, 1939, and that prior to said hearing the parties file computations of the tax in accordance with said mandate and opinion, or otherwise move as may appear proper in the premises" (R. 20).

The Circuit Court of Appeals, in its second opinion (108 Fed. (2d) 712) decided but one issue, and that was whether development expenses should be considered the same as operating costs and be deducted in computing taxable income, in arriving at the net income from the property for

depletion purposes. The Court held that development expenses should be so deducted. Having decided the question of gross income from the property in its former opinion, it now determined the net income from the property and the depletion allowance. So, the cases went back to the Board with these questions settled: Gross income from the property, depletion allowance, and net income from the property. The computations set out in the opinion clearly reflect just what items were considered and just what questions were decided. We reproduce the computations:

"Operating Expense:

Production Expense		$ 272,042.56
General Overhead Expense		31,107.34
Depreciation on Equipment		110,888.17
Total Operating Expense		$ 414,038.07
Development Expense (drlg. costs)		$ 387,982.80
Equipment	$158,411.67	
Less: Depreciation sustained	110,888.17	$ 47,523.50
Total		$ 849,544.37.

"Gross Income from the property $1,213,456.09

Less: Operating and Development Expense	849,544.37
Net Income from the property	$ 363,911.72
50 per cent of the net income from the property equals	181,955.86
27½ per cent of the gross income from the property equals	333,700.42."

The crux of the present proceedings is that the deduction for attorneys' fees or other deductions or other income of the taxpayers, not *from the property*, are not included in these computations and were not before the Court for decision. Those were questions to be determined by the Board "in conformity with the opinion and judgment" of the Appellate Court—that is, not in violation of its opinion and mandate. The determination of the deduction for attorneys' fees was a question entirely outside the opinion of the Court and did not in any way involve a construction of the mandate. So long as the Board accepted the gross income from the property, the production expense, development costs, depreciation, depletion allowance and net income from the property fixed by the Court it was acting "in conformity with the opinion and judgment" of the Court. But so acting did not mean that the Board did not have authority to pass on other matters affecting tax liability, not before and decided by the Appellate Court.

On the first appeal the Circuit Court determined the gross income from the property. But that did not preclude the Board, upon a remanding of the cases, from determining the deductions to be made in determining depletion and arriving at the net income from the property. Over the objections of the Commissioner the Board did determine those questions (R. 68-75) and the Commissioner appealed from the decisions of the Board *more than 30 days after the decisions were entered*, thus impliedly conceding that the Board had a right to decide any question not settled by the Appellate Court.

When the cases came up for hearing on the recomputations filed, petitioners called the Board's attention to the fact that additional income in the sum of $177,343.70 had been added to petitioners' income, and also that petitioners were entitled to a deduction of $173,000 attorneys' fees as an ordinary business expense (R. 28-30). The Commissioner insisted that no additional income had been added and made no contention as to the attorneys' fees, but did exclude it as a deduction. After the argument of counsel the trial member of the Board announced that he would determine these questions from the transcript (R. 32).

The Board entered its decision on April 18, 1940, but made no finding of fact as to the attorneys' fees. They were, however, excluded, and petitioners were given no credit or deduction for that item (R. 86). In other words, the tax was computed by taking the basic figures of gross income from the property, development and operating costs, net income from the property and depletion, as fixed by the Circuit Court of Appeals, without any consideration being given to the $173,000.00 attorneys' fees. Here was a decision of the Board denying petitioners this deduction. Allowing or disallowing the deduction did not in any way involve the mandate of the Appellate Court, but was a decision on an issue expressly reserved by the Board when it made its decision from which the second appeal to the Circuit Court was taken. See Board's decision, Record 75. After noting that petitioners contended that the attorneys' fees should not be deducted in computing the net income from the property, the opinion reads:

"In the situation presented here, we do not decide

this point. However the item of attorneys' fees may have been formerly treated, it will not under this opinion be reflected in the recomputation of the net income from the property for the purpose of applying the 50 per cent limitations on the depletion allowance."

Here is a positive finding and decision that the attorneys' fees will be considered later and after the issue of depletion and net income from the property are determined. This question of attorneys' fees was no more involved in the second opinion of the Circuit Court of Appeals than was the question of depletion or net income in the first opinion of that Court. Under the first opinion the question only of gross income was involved, while the question of operating and development costs, depletion and net income were left open for further consideration by the Board. Under the second opinion the questions of operating and development costs, depletion and net income, which were determined by the Board, were involved, *but not the question of attorneys' fees which was expressly left open by the Board.* Since the Board did not pass on the issue of attorneys' fees and since the Circuit Court of Appeals did not have that question before it on review, it cannot be contended plausibly that the issue of attorneys' fees was involved in the decision of the Circuit Court of Appeals and within the scope of that Court's mandate, or that the issue was not a question yet to be determined by the Board.

Obviously, then, the Board had authority to determine whether the attorneys' fees should be deducted as contended for by petitioners. The deduction was not allowed, as will be clear from this computation:

Gross income from the property . . .	$1,213,456.09
Operating and development expense . .	849,544.37
Net income from the property, without depletion allowance	363,911.72
Depletion allowed under C. C. A. opin.	181,955.86
Net income from the property, after depletion allowance	181,955.86
Attorneys' fees expended	173,000.00
Net income from the property	8,955.86

Each taxpayer had approximately one-sixth of this net income, or $1,492.64. Ralph W. Crews had a personal exemption and credit for dependent of $3,900 (R. 27). The other five taxpayers had credits varying in amounts, but sufficient to show no tax liability.

The recomputation filed by the Commissioner (R. 25-27) and adopted by the Board shows a net income subject to tax of $26,011.79 for Ralph W. Crews and a tax liability of $1,949.41. This is substantially what the net income and tax amounts to with the attorneys' fees of $173,000 eliminated altogether.

It is clear, therefore, that the Commissioner and the Board accepted the basic figures of gross income, production costs, depletion and net income fixed by the Board, and computed the tax from them, without allowing any deduction for attorneys' fees. The Circuit Court of Appeals in its last decision (R. 105) said it was unable to determine from the record whether the $173,000 attorneys' fees had been eliminated from the computation, but that the Commissioner

"impliedly admits that the deduction was eliminated." Then the Court says:

> "Such elimination, if made, probably occurred in the recomputation made after the second decision of the Board."

As we have pointed out, the Board expressly declared in its opinion (R. 75) that the attorneys' fees were not reflected in the recomputation of the net income from the property, thus impliedly holding that it would be reflected as contended for by petitioners if the matter of attorneys' fees again became an issue in the proceedings. Anyhow, the question was left open for future consideration.

It follows, then, we respectfully submit, that the last appeal to the Circuit Court of Appeals was not a proceeding to correct the decision of the Board because of a departure from the mandate of the Appellate Court, but was an appeal to review the action of the Board on an unsettled issue, that of deduction for attorneys' fees as an ordinary business expense. The petitions for review were therefore filed in time.

Proposition Two

The Board of Tax Appeals, under the mandate of the Circuit Court of Appeals, had authority to make such decisions on questions not determined and settled by the Appellate Court as were necessary in order to determine the tax of petitioners.

Supplementing what has already been presented under Proposition One, the mandate of the Circuit Court of Appeals directed that the Board redetermine the tax in accordance with the opinion of the Court. *The only limitation*

on the Board in making its recomputation were the questions determined by the Appellate Court. The same issue was raised by the Commissioner when the cases were first remanded to the Board (R. 71). The Commissioner objected to any further proceedings raising a new issue, contending that the issue of development costs, separate and apart from operating costs, was "inseparably a part of and an essential factor of one of the issues heretofore presented to and decided by the Board and the Circuit Court of Appeals." Another objection by the Commissioner was that petitioners were "seeking for the first time other and further relief not accorded by the decision of the Circuit Court of Appeals," and, further, that the issue to be determined was not "clearly within the purview of the mandate of the Circuit Court of Appeals."

The Board answered the Commissioner's contention by saying that unless the case was remanded with directions to redetermine the tax *on a specific basis*, the Board had authority to give any other or further relief (R. 72), 37 B. T. A. 387, citing *Peavy-Byrnes Lbr. Co.*, 31 B. T. A. 985; affd., 86 Fed. (2d) 234; certiorari denied, 300 U. S. 674, wherein it was said:

> "The rule seems to be well settled by the weight of authority that an inferior tribunal, upon remand of a cause by an appellate court, can not take any action not reasonably within the express or implied directions of the reviewing court. * * * The mandate must be interpreted according to its subject matter; and the decree of the appellate court, as well as that of the court below, may be taken into consideration in the interpretation thereof."

The Board then observed that it was authorized to take such further proceedings as were "within the express and implied directions of the reviewing court," and that certainly the Board was not directed "to make merely a mathematical calculation according to a formula stated in the mandate." The Board further held that it was bound by the gross income determined by the Appellate Court, which was "the settled law of the case," but that it plainly had the right and the duty to determine other questions not settled by the Circuit Court of Appeals and necessary to a computation of the tax.

The situation was the same after the second appeal. There was no formula stated in the mandate, nor was there the direction of any particular judgment. The Board was bound only by the questions determined by the reviewing court, and it still had the right and the duty to determine other questions affecting tax liability, so long as their decision was not inconsistent with the decision of the Appellate Court. It was the Board's duty to take the case up at the point where its erroneous judgment was rendered and proceed from there to determine the tax liability. See *Exchange Mutual Life Ins. Co.* v. *Warsaw-Wilkinson Co.*, 185 Fed. 487, 107 C. C. A. 587.

It is significant that there is no contention that these cases were not appealable. Nor has it been contended that the question of deduction of attorneys' fees should not have been determined. The only issue is whether the question of this deduction was settled by the decision of the Circuit Court of Appeals, thus making the appellate proceedings

an attempt to correct the decision of the Board to conform to the mandate of the Court. Such being true, the Board admittedly had authority to make a decision on the issue of attorneys' fees. This issue not having been involved in any of the appellate proceedings, the petitioners had the right of appeal granted them by Section 1142 of the Revenue Code.

Proposition Three

The question of attorneys' fees had been left open and undecided by both the Board and the Circuit Court of Appeals and was a proper and necessary question to be determined by the Board.

This proposition has been covered by the argument under the two preceding propositions. The Commissioner has never contended that the petitioners were not entitled to the deduction for attorneys' fees, and the Circuit Court of Appeals in its last decision says the Commissioner impliedly concedes that this deduction was not considered by the Board. The question was therefore left open for determination.

Proposition Four

The petitioners were not given a deduction in the decision of the Board for the attorneys' fees and are entitled to such deduction.

We have made it clear from the computation set out in the argument under Proposition One that the petitioners were not given this deduction. It is "impliedly admitted"

by the Commissioner, and the Circuit Court of Appeals so states in its last opinion.

The law is settled that petitioners are entitled to deduct their attorneys' fees as an ordinary business expense from the net income from the property after depletion.

Bliss v. *Commissioner of Internal Revenue*, 57 Fed. (2d) 984.

Commissioner of Internal Revenue v. *Continental Screen Co.*, 58 Fed. (2d) 625.

Commissioner of Internal Revenue v. *Speyer*, 77 Fed. (2d) 824.

Commissioner of Internal Revenue v. *Chicago Dock & Canal Co.*, 84 Fed. (2d) 878.

National Outdoor Adv. Bureau v. *Helvering*, 89 Fed. (2d) 35.

Kales v. *Commissioner of Internal Revenue*, 101 Fed. (2d) 604.

Helvering v. *Speyer*, 296 U. S. 631.

Helvering v. *F. & R. Lazarus & Co.*, 308 U. S. 252.

Deputy v. *DuPont*, 308 U. S. 488.

These cases all construe the Revenue Act of 1928, Sec. 23(a), 26 U. S. C. A., Sec. 23(a), or the Act as amended. The taxes in dispute are for 1930 and come under the 1928 Act.

Proposition Five

The appeal to the Circuit Court of Appeals was governed by Section 1142 of the Internal Revenue Code, not by Section 1140(c)(2) of such Code, and the Circuit Court of Appeals had jurisdiction.

From the argument under the preceding propositions we think it clear that the question of deduction for attorneys' fees from the net income from the property after depletion, as contended for by petitioners, was not before the Circuit Court of Appeals and was not, therefore, settled or affected by that Court's decision and mandate.

The Circuit Court of Appeals sustained the Commissioner's motion to dismiss the petitions to review for lack of jurisdiction, under authority of Section 1140(a)(2) of the Internal Revenue Code, 26 U. S. C. A., Sec. 1142.

The construction of this section apparently has not been before this Court. The Commissioner in his argument before the Appellate Court relied on the cases of *Virginia-Lincoln Furn. Corp.* v. *Commissioner*, 67 Fed. (2d) 8, and *Peavy-Byrnes Lumber Co.* v. *Commissioner*, 86 Fed. (2d) 234. We submit that these cases do not apply to the situation in the instant cases. It is clearly announced in the Virginia-Lincoln Furn. Corp. case that the decision was based on the fact that "nothing remained for the Court to do but make the necessary calculations and enter the order." The rule announced in the Peavy-Byrnes Lumber Co. case as to new issues does not apply, for the reason that the issue of attorneys' fees was properly before the Board without objections from either side.

The statute (Sec. 1140(c)(2), Rev. Code) is not clear, as the Court pointed out in the Virginia-Lincoln Furn. Corp. case, but the purpose of the statute must be to curtail the time for taking appeal only in cases where the Board does not follow the direction of the Appellate Court on the issues before that Court and determined by its decisions. The Board took further action on a matter not before the Circuit Court of Appeals, but a matter necessary to be decided by the Board before the tax liability could be determined. It is of this action of the Board petitioners are complaining. The question of attorneys' fees not being in issue before the Circuit Court of Appeals it could not be within the scope of that Court's mandate, nor would the mandate preclude a hearing on that issue.

It is significant that both mandates from this Court remanded the case for further proceedings in accordance with the opinion, and that after each mandate was filed the Board made identical orders as to further proceedings (R. 13 and 15). After the filing of the first mandate the issue as to whether development expenses should be deducted before or after determination of depletion allowance was raised. From the decision of the Board on this question, the Commissioner appealed to this Court on petitions for review filed under Section 1142 of the Revenue Code and more than thirty days after the decision of the Board.

It was strenuously contended by the Commissioner before the Board that the issue of development expenses could not be raised by the taxpayers, and that the Board had authority only to determine the tax by taking the gross

income as fixed by this Court and making deductions only as they had been previously made before the Board. 37 B. T. A. 387.

The Board held against the Commissioner and the Commissioner appealed. And the appeal was taken more than 30 days after the decision of the Board was rendered. The Circuit Court of Appeals entertained the appeal, so we have both the Commissioner and the Appellate Court holding that the new issue raised after the first appeal was not precluded by the mandate.

As the Board held, it was not directed by this Court "to make merely a mathematical calculation according to a formula stated in the mandate."

In the instant case this Court determined the treatment of development costs and the net income from the property. It set out no formula for determining the tax. It did not attempt to preclude inquiry into the different deductions or exemptions or items. It did not pass upon the proper way to deduct the attorneys' fees. The cases were remanded to the Board for further proceedings in accordance with the opinion.

Since the issue of attorneys' fees was not settled by the decision of the Circuit Court of Appeals, and a decision of that issue did not involve a departure from the mandate of that Court, but was an issue essential to a determination of the tax liability, the aggrieved party had the right to appeal from the decision of the Board on that issue, and to

prosecute the appeal under Section 1142 of the Internal Revenue Code.

We respectfully submit that the Circuit Court of Appeals had jurisdiction to entertain the appeal of petitioners.

CONCLUSION

Writs of certiorari should be granted as prayed in the petition.

Respectfully submitted,

RALPH W. CREWS, ROBERT E. CREWS, AMY TRESNER, CHARLES CREWS, EVERETT J. CREWS, MARY WILLIS,
Petitioners,

By ALBERT L. MCRILL,
J. D. LYDICK,
M. F. PRIEBE,
Their Attorneys.

Dated August 21, 1941.

Nos. 648-658

In the Supreme Court of the United States

October Term, 1943

RALPH W. CREWS, PETITIONER

v.

GUY T. HELVERING, Commissioner of Internal Revenue

RAYMOND R. CREWS, PETITIONER

v.

GUY T. HELVERING, Commissioner of Internal Revenue

GUY T. HELVERING, C

v.

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GUY T.

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GUY T.

v.

GUY T.

v.

GUY T.

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416678—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

NOS. 548–553

RALPH W. CREWS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ROBERT E. CREWS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

AMY TRESNER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

CHARLES CREWS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

EVERETT J. CREWS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

MARY WILLIS, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Board of Tax Appeals wrote no opinion with respect to the issue raised by the petition for writs of certiorari. The opinion of the Circuit Court of Appeals (R. 102–106) is reported at 120 F. (2d) 749.[1]

JURISDICTION

The orders of the Circuit Court of Appeals were entered June 3, 1941 (R. 106–107). The petition for writs of certiorari was filed August 25, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In the particular circumstances of this case, was the period for seeking review by the Circuit Court

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[1] There are other opinions in these cases as follows: B. T. A. opinion of May 2, 1934 (R. 48–54), reported at 30 B. T. A. 615; B. T. A. opinion of September 19, 1934 (R. 54), reported at 31 B. T. A. 187; B. T. A. opinion of September 18, 1935, reported at 33 B. T. A. 36; B. T. A. opinion of November 12, 1935 (R. 55–56), reported at 33 B. T. A. 441; Circuit Court of Appeals opinion of March 29, 1937, reported at 89 F. (2d) 412; B. T. A. opinion of February 23, 1938 (R. 68–75), reported at 37 B. T. A. 387; and Circuit Court of Appeals opinion of December 11, 1939, reported at 108 F. (2d) 712.

of Appeals of a decision of the Board of Tax Appeals governed by Section 1140 or by Section 1142 of the Internal Revenue Code?

STATUTE INVOLVED

Internal Revenue Code, U. S. C. Supp. V, Title 26, Secs. 1140–1142:

> SEC. 1140. DATE WHEN BOARD DECISION BECOMES FINAL.
>
> The decision of the Board shall become final—
>
> * * * * *
>
> (c) *Decision modified or reversed*—
>
> * * * * *
>
> (2) *Upon mandate of the Circuit Court of Appeals.* If the decision of the Board is modified or reversed by the Circuit Court of Appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate, in which event the decision of the Board shall become final when so corrected.

(d) *Rehearing.* If the Supreme Court orders a rehearing; or if the case is remanded by the Circuit Court of Appeals to the Board for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the Court has been affirmed by the Supreme Court, then the decision of the Board rendered upon such rehearing shall become final in the same manner as though no prior decision of the Board had been rendered.

* * * * *

SEC. 1141. COURTS OF REVIEW—

(a) JURISDICTION. The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, except as provided in section 239 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, § 346); and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 240 of the Judicial Code, as amended, 43 Stat. 938 (U. S. C., Title 28, § 347).

* * * * *

SEC. 1142. PETITION FOR REVIEW.

The decision of the Board rendered after February 26, 1926 (except as provided in subdivision (j) of Section 283 and in sub-

division (h) of section 318 of the Revenue Act of 1926, 44 Stat. 65, 83, relating to hearings before the Board prior to February 26, 1926) may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, or, in the case of a decision rendered on or before June 6, 1932, within six months after the decision is rendered.

STATEMENT

These cases concern the income tax liability of the petitioners, six brothers and sisters, for the year 1930. The litigation has been extensive, the cases having been before the Board of Tax Appeals three times, followed each time by an appeal to the court below. During the course of these proceedings, many different items in the complicated account of the taxpayers were considered by the Board and by the court below. For purposes of the present petition, however, only two items need be considered: a $173,000 deduction claimed by the taxpayers for litigation expenses, and a $177,343.70 item which the Commissioner determined was the value of an indemnity contract and assessed as income to the petitioners. This Statement will be limited to the facts necessary for an understanding of the situation with respect to these two items.

The taxpayers owned some oil property subject to an oil lease. A dispute arose between the taxpayers and the lessee as to whether the lessee had conducted operations in conformity with the lease agreement. During the course of the dispute, the money received for oil extracted from the property was placed in escrow. The dispute was compromised in 1930, the taxpayers being given the right to receive the escrowed funds, together with $355,000 in cash. The funds in escrow, however, had been embezzled and there was no possibility of recovery from the escrow agent. The only thing which the taxpayers received was an indemnity contract executed by officers of the escrow agent to cover the defalcation. The admitted expenses of the taxpayers in connection with the litigation resulting in the 1930 compromise and their attempt to recover the embezzled funds amounted to $173,000 (R. 49–51).

In their income tax returns for the year 1930, the taxpayers reported a net loss and therefore no income tax liability (R. 36, 51). The Commissioner, however, determined that the taxpayers had realized net income and assessed deficiencies accordingly (R. 52). In computing net income, the Commissioner included as an income item the amount of $177,343.70, which he determined was the value of the indemnity contract given to the taxpayers by the officers of the escrow agent (R. 37). He allowed the taxpayers a deduction of

$173,000 for litigation expenses (R. 38). He did not allow them any depletion deduction.

The taxpayers filed petitions for review with the Board of Tax Appeals (R. 32–35). The issues before the Board were as to the proper amount of gross income to be included and as to whether a depletion deduction should be allowed. In deciding those issues, the Board rendered four opinions (30 B. T. A. 615, R. 48–54; 31 B. T. A. 187, R. 54; 33 B. T. A. 36; 33 B. T. A. 441, R. 55–56), in the course of which it held, among other things, that the indemnity contract, valued by the Commissioner at $177,343.70, was worthless from the date of its execution (33 B. T. A. 36, 40). The Board further held, as the Commissioner had conceded in his computation, that the litigation expenses of $173,000 were properly deductible in determining net income (33 B. T. A. 36, 51).[2]

The taxpayers appealed to the Circuit Court of Appeals. That court affirmed the Board's decisions in the main but reversed and remanded the case for further proceedings on items not now in issue. In the course of its opinion, the Circuit Court of Appeals recognized both that the indem-

[2] The issue litigated before the Board with respect to this $173,000 item was whether it was deductible from the gross income realized from the oil property in determining the net income from the property for depletion purposes. The respondents contended that it should not be deducted; the Commissioner contended, and the Board held, that it should be (33 B. T. A. 36, 51).

nity contract was worthless from the date of its execution and that the taxpayers were entitled to a deduction for the $173,000 litigation expenses (89 F. (2d) 412).

Upon remand, the Board interpreted the mandate of the Circuit Court of Appeals as one for a new trial, receiving new evidence on one question not now in issue and revising its previous depletion computations (R. 68–75). Pursuant to the opinion of the Board on remand, the Commissioner submitted a proposed computation of the petitioners' tax liability (R. 75–78). This computation was based upon the net income as stated in the Commissioner's original deficiency letter (R. 35–38), without taking out of the account the income item of $177,343.70 for the indemnity contract which the Board had found to be worthless. In failing to take out this income item, the Commissioner's computation erroneously departed from the law of the case. However, the Board entered its decisions based upon the Commissioner's computation (R. 78).

The next step was an appeal to the Circuit Court of Appeals by the Commissioner, seeking review of the Board's determination of a depletion question not now in issue. The Circuit Court of Appeals reversed the Board on this question and remanded the case with instructions to the Board to redetermine the tax in accordance with the Circuit Court of Appeals' opinion on the depletion issue (108 F. (2d) 712).

On April 18, 1940, the Board entered its final decisions determining the tax recomputed in accordance with the last mandate of the Circuit Court of Appeals (R. 86). This determination was based directly upon a recomputation submitted by the Commissioner (R. 25–27), in which the only adjustment made in his previous computation which the Board had approved was a decrease in the depletion allowance in accordance with the Circuit Court of Appeals' second opinion (R. 26). On July 5, 1940, the taxpayers again appealed to the court below, contending, alternatively, that the $177,343.70 item had been erroneously included in taxable income, and that they had been denied a deduction for the $173,000 litigation expenses. As appears from the facts above stated, the error of including the $177,343.70 item had been made in the decisions of the Board upon the first remand of the case; the Board's decisions upon the second remand simply changed its earlier decisions in the one respect (depletion) in which it had been instructed to change them by the second mandate of the Circuit Court of Appeals. As also appears from the facts above stated, the petitioners had been allowed a deduction of $173,000 for litigation expenses in the Commissioner's original deficiency letter, and the computation in this letter served as the basis for all subsequent computations; in no computation succeeding the computation in the original deficiency letter was

there any change which had the effect of eliminating this deduction.[3]

The Commissioner moved in the court below to dismiss the taxpayers' petitions for review on the ground that they were not timely because they were not filed within 30 days after the decisions of the Board, as required by Section 1140 (c) (2) of the Internal Revenue Code, *supra*. The taxpayers urged that Section 1142, rather than Section 1140 (c) (2), provided the time for review, and that the petitions were timely under Section 1142 because they were filed within three months after the Board's decisions. The court below held that Section 1140 governed, and dismissed the petitions (R. 106–107).[4]

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[3] The statement in the opinion of the court below (R. 105) that it cannot be determined from the record what disposition was made of the $177,343.70 and $173,000 items is, we believe, clearly inaccurate.

[4] The Commissioner's computation approved by the Board contained other errors which were favorable to the taxpayers. For example, the $173,000 litigation expenses were not deducted from the gross income from the oil property in determining net income for depletion purposes. Furthermore, the computation erroneously omitted from gross income the item of $47,871.79, or nearly $8,000 per taxpayer, which was found to be income received by the taxpayers from sources other than the oil property. Although this error is not ascertainable from the printed record because the taxpayers' 1930 returns are not included in the record, it is ascertainable from a comparison of the deficiency notices and the Commissioner's computations, on the one hand, with the 1930 returns on the other. The original Board opinions required inclusion of the $47,871.79 item (33

ARGUMENT

1. Petitioners have prepared their petition for certiorari on the assumption that they were not allowed a deduction for the $173,000 litigation expenses. The analysis of the record contained in the Statement shows that this assumption is incorrect and that the claimed deduction has in fact been allowed. The only error of which petitioners may complain, therefore, is the Board's failure to exclude from the computation the $177,343.70 item for the indemnity contract. The Board should have excluded this item in its determination of the tax liability upon the first remand of the case from the Circuit Court of Appeals. However, it failed to do so, and its error in this respect was carried over into its determination of the tax liability upon the second remand.

The sole issue in the case, therefore, is whether the court below had jurisdiction to correct this error upon a petition for review filed more than 30 days, although less than three months, after the Board's final decisions were entered. The court below held that it lacked jurisdiction be-

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B. T. A. 36, 52) and the first opinion of the Circuit Court of Appeals recognized that it was a proper income item (89 F. (2d) 421, 414). No subsequent opinion of either the Board or of the court below has changed that decision or dealt in any way with the $47,871.79 item. If all mistakes were corrected, the taxable income of each taxpayer would be decreased by about $7,000, making a difference in tax and surtax of approximately $850.00.

cause of the provisions of Section 1140 (c) (2) of the Internal Revenue Code. This holding is, we believe, correct, it involves no conflict of decisions, and it presents no question calling for the consideration of this Court.

2. Section 1140 (c) (2) provides that when a decision of the Board of Tax Appeals is modified or reversed by a Circuit Court of Appeals "the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final on the expiration of 30 days from the time such decision of the Board was rendered, unless within 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected so that it will accord with the mandate * * *." Section 1142 relates to the ordinary petitions to review decisions of the Board, and provides that such petitions must be filed within three months of the date of the decision. Under these statutory provisions it is plain that an appeal from a decision of the Board rendered after a hearing, or a rehearing ordered by an appellate court (Section 1140 (d)), may be taken at any time within three months of the date of the decision, but that when an appeal has been taken and the case is remanded for correction of the Board's determination in accordance with the appellate court's opinion and without a rehearing, an appeal from the decision rendered upon the remand must be taken within 30 days. Since

in this case the decisions appealed from were entered upon remand from the court below, and without rehearing, Section 1140 (c) (2) is clearly applicable. *Virginia Lincoln Furniture Corp.* v. *Commissioner,* 67 F (2d) 8 (C. C. A. 4).

Taxpayers in their petition overlook the affirmative statement in Section 1140 (c) (2) that "the decision of the Board rendered in accordance with the mandate of the Circuit Court of Appeals shall become final upon the expiration of 30 days" unless within those 30 days an appeal is taken. Here, the decisions were "rendered in accordance with the mandate of the court" and consequently, under the express language of the provision, became final upon the expiration of 30 days.

To avoid this conclusion, taxpayers apparently argue that Section 1140 (c) (2) lends finality, not to the decision itself, but only to that aspect of it which involves departure from the mandate of the reviewing court. This construction, however, finds no support in the statutory language and is clearly incompatible with the purpose of the provision. Furthermore, the contention erroneously assumes that a decision of the Board, rendered upon a mandate which simply instructs the Board to correct its determination in accordance with the appellate court's opinion and without rehearing, is reviewable for errors other than failure to comply with the mandate. Since the only action which the Board may take upon such a remand is to com-

ply with the directions of the reviewing court (see *Peavy-Byrnes Lumber Co.* v. *Commissioner,* 86 F. (2d) 234, 235 (C. C. A. 5), and cases cited), the only question reviewable at that point is whether in fact the Board's action did or did not conform to the mandate—the very question specifically governed by Section 1140 (c) (2). Cf. *Virginia Lincoln Furniture Corp.* v. *Commissioner, supra.*

The error in respect to the $177,343.70 item was made by the Board after the first remand. Petitioners could then have sought review of that question by the court below. Having failed to do so, it seems plain that they cannot seek review of the same question at a later stage of the litigation, simply because the Board was directed to, and did, change its decisions in another respect entirely unrelated to the $177,343.70 item.

The same conclusion is reached if the mandate of the Circuit Court of Appeals be more broadly construed so as to direct the Board to enter a proper judgment in accordance with the law of the case. If the mandate is to be so construed, the Board's failure to exclude the $177,343.70 item in accord with the law of the case was a failure to conform to the mandate. Under the specific provisions of Section 1140 (c) (2), therefore, the only remedy for the taxpayers was to have applied to the court below for review within 30 days. Having failed so to do, the court below was without jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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